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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. LANELL MARTIN, Defendant and Appellant.	B207291 (Los Angeles County Super. Ct. No. KA077741)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles Horan, Judge. Affirmed.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr. and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

A defendant appeals from the judgment of conviction for attempted robbery, burglary and illegal possession of a crack cocaine pipe. He contends the trial court abused its discretion in denying his request to dismiss one of his prior "strike" convictions in the interest of justice. He also contends that the 35-year-to-life sentence the court imposed under the Three Strikes law constitutes cruel and unusual punishment under the state and federal Constitutions. We affirm.

BACKGROUND

Semon Kaur owned a Mr. Pizza restaurant in Pomona. She and another employee were working in the restaurant on the evening of January 14, 2007. At approximately 7:20 p.m. defendant, Lanell Martin, entered the restaurant when no other customers were present. Martin walked behind the counter area toward Kaur where she stood near the cash register. Martin told Kaur, "'Give me [the] fucking money'" and directed her to "'open the cash register.'" Martin raised his hand as if to strike Kaur. Kaur fell to the floor and "yell[ed]" out to her employee to call 911. The employee ran out of the restaurant, and Martin followed her.

A police officer on patrol heard a woman's screams and then saw Martin running across the parking lot. Martin offered no resistance when detained. The officer found a crack cocaine pipe when searching Martin.

An information charged Martin with attempted robbery (Pen. Code, §§ 664, 211),[1] second degree commercial burglary (§ 459), and possession of an illegal smoking device (Health & Saf. Code, § 11364, subd. (a)). The information further alleged that Martin had suffered two prior felony convictions for purposes of sentencing under the Three Strikes law. (§§ 1170.12, subds. (a) – (d), 667, subds. (a) – (i).)

In a bench trial the court found Martin guilty as charged. In a separate proceeding the court found true the prior conviction allegations. After reviewing additional information the trial court denied Martin's request to strike one of his prior "strike"

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1 All further unmarked statutory references are to the Penal Code unless otherwise noted.

convictions. The court sentenced Martin to 25 years to life on the attempted robbery conviction and, consecutive to this term, imposed two five-year enhancements under section 667, subdivision (a)(1), for a total term of 35 years to life. The court stayed sentence on the burglary conviction and imposed a one-day jail term on the misdemeanor conviction for possessing an illegal smoking device. Martin appeals from the judgment.

DISCUSSION

MOTION TO STRIKE PRIOR "STRIKE" CONVICTIONS

Martin requested the court to strike one of his prior "strike" convictions in the interest of justice (§ 1385) under the authority of *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497. The court deferred ruling on the request and expressed concern about Martin's "sometimes rather pronounced psychological difficulties." The court ordered the Department of Corrections and Rehabilitation to prepare a diagnostic report before deciding whether to strike Martin's prior "strike" convictions. (§ 1203.03.) The court also requested that the parties provide information about the factual circumstances of Martin's prior serious felony convictions to aid it in determining an appropriate sentence.

At a continued hearing the court reviewed Martin's criminal history. This history showed that in January 1994 he was convicted of using or being under the influence of controlled substances (Health & Saf. Code, § 11550, subd. (a)) and received a term of probation. In September 1994 Martin was again convicted of using or being under the influence of controlled substances (Health & Saf. Code, § 11550, subd. (a)) and again received probation.

In April 2004 Martin was convicted of second degree robbery. (§ 211.) The preliminary hearing transcript of the proceedings showed that in November 2003 then 80-year-old Harrison Silver parked his car and got out to purchase a newspaper from a newspaper vending machine. When Silver returned to his car Martin entered through the unlocked passenger side door, asked Silver to drive him for a few blocks, and displayed some type of sharp weapon. Silver did not know if the weapon was a knife or a piece of

glass. Martin then demanded Silver's wallet and took the $120 Silver had in his wallet. Martin told Silver that he had a gun and to get out of the car. When arrested Martin was driving Silver's car. Martin received a term of three years' formal probation.

In October 2004 Martin committed another second degree robbery. According to police reports in the case, Martin entered a 99 Cents Only Store and brought some merchandise to the checkout counter after all the other customers had left the store. Martin walked around the counter, pulled out a knife, and pointed it at the cashier. He told the cashier, "'Don't say anything or I'll stab you, just open the cash register.'" Martin took the money out of the cash register and walked out of the store. Police officers later found Martin in a stolen vehicle. Martin had a knife in his shoe when arrested.

The trial court in this case also reviewed the diagnostic reports of Martin's psychological evaluations prepared by the Department of Corrections and Rehabilitation. One report concluded that "Martin would pose too great a risk for re-offense if he were to be released to the community." The psychologist noted that Martin's mental condition was within "normal limits consistent with incarceration" but that Martin had a serious drug addiction and opined that Martin's criminal activity was the result of his abuse of PCP and cocaine. Martin told the psychologist that he committed the current offenses because "he did not have the nerve to shoot himself like his brother did" and was hoping to commit "suicide by cop." Martin reported that two of his other brothers were then serving prison sentences for murder and that a fourth brother worked as a probation officer.

A second report noted that Martin had been diagnosed with schizophrenia and was taking medications and that his intellectual functioning was average. Martin told this psychologist that he had attempted suicide between seven and eight times. Martin, then 48 years old, stated that he had been abusing drugs since he was 14 years old. Martin said he had been attending Narcotics Anonymous meetings but admitted using PCP just before attempting the robbery in this case. The psychologist opined that Martin had limited insight, exercised poor judgment, and displayed multiple risk factors for

re-offending. This psychologist nevertheless opined that Martin was an "adequate candidate for probation and [did] not present a substantial risk to the community."

The court dismissed the second report's suggestion of probation as "ridiculous." The court concluded that the one substantial mitigating factor in this case was that there was "something wrong" with Martin, but noted that some of Martin's difficulties were "brought on by his own drug use." The court commented that Martin's criminal record was "not trivial," but "certainly not the worst [the court had] ever seen."

Martin's counsel blamed Martin's problems on his "incredible dependence on drugs. It's wrecked Mr. Martin, it's made a wreck out of his life. It's a wasted life." He urged the court to strike one of Martin's prior "strike" convictions, arguing that (1) the current crimes were minor, lasting only 5 to 10 seconds, (2) Martin had used no weapon, (3) Martin did not hit Kaur, (4) Martin did not take advantage of his large size and strength to either overpower Kaur or to forcibly take money from the cash register, (5) Martin was cooperative with police and did not resist arrest, (6) when interviewed by the psychologists Martin expressed remorse and blamed his criminal behavior on his drug addiction, and (7) Martin intended to try to address his drug problem in the future.

The court commented that, "I've really tried to do my best, and I do thank all counsel for your attempts to get the court the information to assist. I was actually, frankly, sort of hoping given what I saw in the videotape and the obvious impairment of the defendant in some respects, I was sort of hoping maybe one or both of these priors would turn out to be, . . . non serious in the factual sense where you might have an Estes robbery or something like this where a person goes into a Wal-Mart to steal a bottle of liquor and then takes a poke at the security guard. That's a world of difference from a person who sets out, it seems to me, to use violence to obtain property.

"The problem is that both of the prior incidents are factually serious in the court's estimation. In one he used a knife against a female in a store. He didn't stab her with it, but he certainly threatened her with it. That's an egregious offense.

"On the other offense . . . again, I would call that a factually serious matter where a person is bold enough to get into a vehicle and use a weapon of some sort to obtain that vehicle and then go out and try to buy drugs immediately thereafter.

"The problem, the defendant's problem is, in fact, I think in large part that his conduct[] is motivated undoubtedly due to his desire to obtain drugs, it would seem to the court. This is what he told the people up at the prison on the 1203, I believe, and apparently what he was doing on one of the priors; immediately thereafter he's out trying to get some cocaine on that occasion, PCP I think this time is what he's involved with.

"The problem is this: While in some sense it may be said to be mitigating when a person has destroyed himself, and you have stated that correctly, he's done himself grave damage, and in a sense that may make his conduct somewhat mitigated in terms of culpability while not constituting a defense, but at the same time it points out the absolute dangerousness. A fellow over a couple of decades now has not been able to shake his addiction, and he's tried to. He was going to either AA or Narc-A-Non or one of those, he was making some efforts, but he's been unable to shed himself of the use of drugs. That being the case, it appears to me that honestly stated he's dangerous."

The court concluded that Martin posed a threat to society "because he will continue to try to steal and use force, if necessary, to try to obtain money and property to feed that drug habit. So frankly, . . . I believe that if the court were to strike that strike, it would not be an appropriate use of the court's discretion." Accordingly, the court declined to strike Martin's prior "strike" convictions and sentenced him as a third "strike" offender.

On appeal, Martin argues that the current offenses are relatively minor and points out that many of the aggravating factors listed in the California Rules of Court are inapplicable. For example, Martin points out that (1) the burglary and attempted robbery did not involve violence or bodily harm, (2) he did not use a weapon in the commission of the crimes, and (3) the victim was not particularly vulnerable. (See Cal. Rules of Court, rule 4.421.) Martin suggests as a mitigating factor that his two prior "strike" convictions were the result of a single period of aberrant behavior, occurring late in his

life, due to his drug addiction. (Citing *People v. Garcia* (1999) 20 Cal.4th 490, 503 [trial court properly considered as a mitigating factor the circumstance that all the defendant's prior convictions arose from a single period of aberrant behavior and resulted in a single prison term].) Martin would have received a sentence of 16 years in prison had he been sentenced as a second "strike" offender which, he claims, is more than adequate punishment for his current crimes. Martin contends that for these reasons the trial court's refusal to strike any of his prior "strike" convictions was an abuse of discretion. We disagree.

"[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, 'in furtherance of justice' pursuant to Penal Code section 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.) A ruling on such a request is subject to review for abuse. (*Id*. at p. 162.)

On appeal, the burden is on the party attacking the sentence to "'clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' [Citation.] Concomitantly, '[a] decision will not be reversed merely because reasonable people might disagree. "An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge." [Citations.]' [Citation.]" (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977-978.) Thus, in reviewing sentencing matters appellate courts must apply an "extremely deferential and restrained standard." (*Id*. at p. 981.)

Under this standard we find no abuse of discretion in the trial court's conclusion, made after an in-depth analysis of Martin's background, character and prospects, that Martin did not fall outside the spirit of the Three Strikes law.

Nothing about Martin's prior felony convictions was favorable to his position. He committed two robberies in which he used weapons to force his victims' compliance with his demands for money. Although his current crimes did not involve a weapon, use of physical force, or bodily injury, they were nevertheless serious crimes which presented the potential for violence. Martin raised his arm in the air in preparation to hit Kaur. He might well have done so had Kaur not fallen immediately to the floor.

Nor did the trial court err in finding little favorable in Martin's background, character, or prospects such that the interests of justice compelled a more lenient sentence. Martin's criminal history demonstrated that in midlife he developed a pattern of criminal conduct, apparently driven by his need to support his nearly life-long illegal drug habit. Nothing in his background suggested that he had prospects for reforming. Indeed, although Martin attended some Narcotics Anonymous sessions he admitted ingesting PCP just before committing the crimes in this case. (See *People v. Barrera* (1999) 70 Cal.App.4th 541, 554-555 [although the current offense was neither serious nor violent, the defendant's long-standing drug addiction, criminal history, and poor performance on probation and parole did not bode well for the defendant's prospects to alter his lifestyle].)

CRUEL AND UNUSUAL PUNISHMENT

Martin contends the sentence of 35 years to life in state prison constitutes cruel and unusual punishment in violation of article 1, section 17 of the California Constitution and the Eighth Amendment of the United States Constitution. He claims the sentence of 35 years to life is grossly disproportionate to the current crimes considering that, given his age of nearly 50, he will never be released from prison, he did not use a weapon, no one was injured, and he suffers from a mental condition caused by his drug addiction. We disagree.

"Under the federal Constitution, the issue is whether the sentence is 'grossly disproportionate' to the crime. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 1001 . . . .) Under the state Constitution, the issue is whether the sentence 'is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.' (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted.)" (*People v. Gray* (1998) 66 Cal.App.4th 973, 992.)

Martin complains that California's Three Strikes sentencing law is the most stringent in the nation and points out that the Court of Appeal in *People v. Carmony* (2005) 127 Cal.App.4th 1066, 1083-1084 held that a 25-year-to-life sentence for a technical violation of the sex offender registration statute constituted cruel and unusual punishment. He argues that his sentence of 35 years to life is similarly disproportionate to his crimes of attempted robbery and burglary when compared to a first degree murder conviction which carries a penalty of only 25 years to life. In making these arguments Martin focuses primarily on his present offenses and gives only passing recognition to the fact that recidivism is relevant to sentencing. With regard to a person sentenced under a recidivist statute such as the Three Strikes law, recidivism is precisely what is being punished. (See, e.g., *Rummel v. Estelle* (1980) 445 U.S. 263, 284; *People v. Cooper* (1996) 43 Cal.App.4th 815, 823-824.)

Nor, given his criminal history and the serious nature of his current crimes, is Martin's sentence of 35 years to life cruel and unusual punishment under the federal Constitution. In *Ewing v. California* (2003) 538 U.S. 11 and *Lockyer v. Andrade* (2003) 538 U.S. 63 the United States Supreme Court rejected cruel and unusual punishment claims and upheld sentences of 25 and 50 years to life, respectively, under California's Three Strikes law imposed on defendants whose current crimes were minor thefts. The Supreme Court has also rejected a claim that a sentence of 50 years to life, which given the defendant's age, was in effect a sentence of life without the possibility of parole, constituted cruel and unusual punishment for petty theft with a prior. (*Id*. at pp. 74-75, fn. 1.) Martin's current crimes involve the far more serious felonies of burglary and

attempted robbery. (See, § 1192.7, subd. (c)(18) [burglary]; see also, § 1192.7, subd. (c)(19) [robbery].)

Likewise, Martin's sentence does not constitute cruel and unusual punishment under the California Constitution. (See *In re Lynch* (1972) 8 Cal.3d 410, 423-427 [describing the framework for analysis of allegedly cruel and unusual sentences under the California Constitution].) Even a parole date that may be beyond a defendant's life expectancy does not implicate the cruel and unusual provisions of the state or federal constitutions. (See, e.g., *People v. Ayon* (1996) 46 Cal.App.4th 385, 399.)

Considering Martin's criminal history and the serious nature of his current offenses, the 35-year-to-life sentence in this case is not so grossly disproportionate to his crimes as to offend common notions of decency and shock the conscience. (*Harmelin v. Michigan, supra,* 501 U.S. at p. 1001; *In re Lynch, supra,* 8 Cal.3d at p. 424; *People v. Dillon* (1983) 34 Cal.3d 441, 479.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

BAUER, J.*

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* Judge of the Orange County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.